STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES LESTER RALSTON,

Defendant-Appellant.

UNPUBLISHED
February 25, 2010

No. 290378
Ingham Circuit Court
LC No. 08-000770-FH

Before: Fitzgerald, P.J., and Cavanagh and Davis, JJ.

PER CURIAM.

A jury convicted defendant of aggravated stalking, MCL 750.411i. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to a prison term of 28 to 90 months. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

Complainant testified that she first encountered defendant while she was working alone at the Crystal Bar in Holt in January 2008. Her hairstyle at the time consisted of a shaved head. According to complainant, near the end of her shift defendant handed her a poem he had written, which she described as "disgusting," "dominating and forceful," and sexual in nature, causing her to feel "uncomfortable and really unsafe." When defendant asked what she thought of his effort, complainant replied, "That's not my style, I'm not into that." Complainant further testified that she made a note of defendant's name and E-mail address in the bar's logbooks the night of that encounter, "just in case I came up missing."

Complainant did not see defendant again until doing so in court, but in February 2009 she received at the bar "a few more pages of his version of poetry," again laced with references to sexuality, violence, and Satan. Then, in May of that year, she received ten more pages of such ruminations.

Complainant obtained a personal protection order (PPO) against defendant, barring him from any further contact with her. After the order was in effect, however, she received from defendant two more mailings at her work address. Complainant identified a motion to terminate the PPO, and a proof of service, and sample court order from the first mailing, and a supplemental motion to modify or terminate with supporting documentation from the second.

Above her name on the first envelope was written "Lesbee Friends," and at the top of one page was written "Let's not be enemies . . . ." Complainant opined that the "Lesbee" wording was probably a reference to lesbianism, prompted by her baldness. The return address of the second envelope was styled as "Johnny Rotten, John Salemi Attorney at Law." The documentation within included the statements, "I'm going to spank the guilty. Every one take cover," and "Revenge is sweet when you are in jail or in prison locked up tight."

The trial court instructed the jury on aggravated stalking with the following elements:

> First, that the Defendant committed two or more willful separate and non-continuous acts of unconsented contact with [complainant].
>
> Second, that the contact would cause a reasonable individual to suffer emotional distress.
>
> Third, that the contact caused [complainant] to suffer emotional distress.
>
> Fourth, that the contact would cause a reasonable individual to feel terrorized, frightened, intimidated, threatened, harassed or molested.
>
> Fifth, that the contact caused [complainant] to feel terrorized, frightened, intimidated, threatened, harassed or molested.
>
> Sixth, the stalking was committed in violation of a court order.

This instruction thus reflects the criteria for aggravated stalking set forth in MCL 750.411i(2)(a).

On appeal, defendant argues that the prosecution failed to present legally sufficient evidence to support his conviction, and, alternatively, that the trial court erred in refusing to grant a motion for a mistrial in response to what appeared to be a special security officer sitting next to complainant at trial.

II. Sufficiency of the Evidence

When reviewing the sufficiency of evidence in a criminal case, a reviewing court must view the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). Whether the prosecutor presented sufficient evidence to support a verdict of guilty is a question of law, calling for review de novo. *Id*. Statutory interpretation likewise presents a question of law for this Court to consider de novo. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997).

MCL 750.411i(1)(e) defines "stalking" as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

Subsection (1)(d) defines "harassment" as "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a

reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress," but to exclude "constitutionally protected activity or conduct that serves a legitimate purpose."

Subsection (1)(f) defines "unconsented contact" as "any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued," and subsection (1)(f)(*vi*) states that this includes "[s]ending mail" to the person stalked.

In order to elevate the stalking charge to aggravated stalking, the prosecution invoked MCL 750.411i(2)(a), which is applicable where "[a]t least 1 of the actions constituting the offense is in violation of a restraining order and the individual has received actual notice of that restraining order or at least 1 of the actions is in violation of an injunction or preliminary injunction."

In this case, plaintiff characterizes defendant's initial contact with complainant as the first of the series of harassing, unconsented contacts. Given that complainant was working the bar, and that defendant was a customer at the time, any merely benign communication initiated by defendant to which complainant responded with the measured words, "That's not my style, I'm not into that," could not fairly be considered the first stage of a stalking campaign. But defendant's writing on that occasion, full of references to sex, aggression, and Satan, was overtly provocative. Under those circumstances, complainant's tepid yet unmistakably unreceptive response should be understood to have indicated that that and any additional such communications were unwelcome.

In any event, after that initial encounter, the two mailings that followed, full of similar content, each constituted unconsented, harassing contacts.

This leaves the question whether, for purposes of defendant's conviction of aggravated stalking, such a contact took place in violation of the PPO complainant had obtained.

Defendant makes much ado over his right, and duty, to serve copies of documents relating to his efforts to modify or terminate the PPO on complainant. Such paperwork does indeed qualify as communication "that serves a legitimate purpose," and, given due process concerns, "constitutionally protected activity" as well. MCL 750.411i(1)(d). But defendant cites no authority for the proposition that a person with such legal business to tend to can thereby graft any gratuitous, let alone threatening or otherwise offensive, communications onto such documentation and thereby bring those such additional utterances under the cover of the legitimate or constitutionally protected communications.

We hold that a single document can contain both legitimate, constitutionally protected, speech and also speech that works a violation of a PPO. That leaves the question whether the gratuitous additions in this instance constituted such improper speech.

Although the few extraneous remarks accompanying the legal documents hardly matched the sheer volume of the three communications that initially upset complainant, the statement, "Lesbee Friends" could reasonably be interpreted as sexual in nature, intrusively commenting on what her sexual orientation might be, and thus obviously not a contact permitted by the PPO.

This is all the more true of the statements, "I'm going to spank the guilty. Every one take cover," and "Revenge is sweet when you are in jail or in prison locked up tight." The reference to spanking was, at best, aggressively sexual, at worst, overtly violent. And defendant's talk of revenge to one who had obtained a PPO in response to unwelcome communications of a sexual, violent, and occultist nature could only be expected to inflame that victim's state of distress.

For these reasons, defendant's challenges to the sufficiency of the evidence must fail.

III. Appearance of Additional Security

At trial, defense counsel elicited from a police deputy that complainant had a brother who was also a police deputy. Defendant asserts that this uniformed brother-deputy sat with complainant at trial. In his brief on appeal, defendant suggests that this seating arrangement pervaded the whole trial, but we note that, at sentencing, defendant specified closing arguments as the time during which complainant sat accompanied by her uniformed brother. Closing arguments took place on January 6, 2009. Defendant filed a motion *in propria persona* for a mistrial over the matter three days later on the ground that he suffered prejudice from the appearance that he was so dangerous that complainant needed extra security while in court. The trial court denied the motion on the ground that defendant failed to "cite any authority demonstrating that such a motion may be raised for the first time three days after his jury trial concluded."

We review a lower court's decision on a motion for a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). However, because defendant raised no timely objection, but instead raised this issue for the first time only after there was no opportunity for the trial court to consider determining or correcting any possible prejudice in the matter, this issue comes to this Court as an unpreserved one. A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Where plain error is shown, the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

We conclude that defendant fails with this issue to bring to light either plain error or prejudice to his substantial rights. Had there been a timely objection, the court might well have asked complainant or her brother to sit apart, or could have offered a curative instruction. But even had the court elected to take no action, the result would not have been an irregularity sufficiently prejudicial to defendant's rights, and impairing his ability to get a fair trial, as to have warranted a mistrial. See *Haywood*, 209 Mich App at 228; *People v Ramano*, 181 Mich App 204, 220; 448 NW2d 795 (1989) (a trial court's general conduct of trial is reviewed for an abuse of discretion). See also *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992) (a criminal defendant is entitled to a fair trial, not a perfect one).

Because a defendant in shackles presents an image in conflict with the presumption of innocence, the shackling of a criminal accused at trial is disfavored. See *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). Defendant likens the appearance of extra security with complainant to a defendant in shackles, but the comparison is a strained one. A shackled defendant indicates an existing judgment of an immediate need and right to deprive the

defendant of his or her liberty. Not so if a police officer happens to sit with even the complaining witness.

The United States Supreme Court has held that the conspicuous deployment of security personnel in a courtroom does not have the same potential to prejudice a defendant as does forcing the defendant to appear in shackles or prisoner's clothing. *Holbrook v Flynn*, 475 US 560, 568-569; 106 S Ct 1340; 89 L Ed 2d 525 (1986). While the Court recognized that "it is possible that the sight of a security force within the courtroom might under certain conditions create the impression in the minds of the jury that the defendant is dangerous or untrustworthy," *id.* at 569 (internal quotation marks and citation omitted), the Court nonetheless concluded in that case that the presence of four uniformed state troopers in the first row of the spectator section at a criminal trial of six defendants did not rise to that level. *Id.* at 571.

Moreover, as plaintiff points out, the jury heard testimony to the effect that complainant had a brother who was a police deputy, and thus should more likely have supposed that that relationship explained the presence of a police officer with complainant at trial than speculated that the officer's presence indicated that defendant was deemed a great threat to complainant even in open court.

For these reasons, we reject this claim of error.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Alton T. Davis